for the trial court having jurisdiction to resolve. I regret to say that the preliminary inquiry was very badly conducted by the prosecution. It is the duty of the prosecution, in my view, to assist the magistrate by presenting credible evidence so as to constitute sufficient grounds for the accused to be committed for the offence of murder, as in this case, to the High Court. On the evidence presented by the prosecution before her, I am of the opinion that she was right to rule that there is insufficient evidence to constitute the ingredients of the charge under s 302, an offence triable by the High Court.

What then is the next option open to her? She decided to invoke her powers under s 140(i)(b) of the CPC by preferring a charge under s 304 of the Penal Code and had it transferred to the sessions court, the court having jurisdiction for such offence. However, s 140(i)(b) of the CPC reads:

> ... order the accused to be tried before some other magistrate.

Section 140(i)(b) of the CPC was extensively and carefully considered by Wan Yahya J (as he then was) in the case of *Re Pang Po Pah*,[2] where his Lordship held that the learned magistrate may, when the preliminary inquiry evidence discloses an offence triable by a sessions court, frame a charge for that offence and, in accordance with s 140(i)(b) read with s 177 of the CPC, transfer the case to be tried by a president of the sessions court, giving an extended meaning to the word 'magistrate' to include 'president' (or now 'judge'). I am in full agreement with the interpretation of s 140(i)(b) of the CPC by my learned brother.

In the circumstances, I am of the opinion that the learned magistrate had rightly invoked her powers under s 140(i)(b) in view of the evidence presented by the prosecution in the preliminary inquiry, though perhaps it would appear that she had erred in her reasons for making such an order. From a perusal of the record of the preliminary inquiry, I am satisfied that there are no valid grounds for me to disturb her order and accordingly I affirm her said order and would direct the accused to appear before the sessions court, Kuching, on 13 November 1989 to be dealt with according to law. His bail is extended to 13 November 1989.

Order accordingly.

Solicitors: *Anthony Tai Advocates.*

Reported by *Mathavan Devadas*

Datuk Hussain bin Mohamed v First Malaysia Finance Bhd (Bank Negara Malaysia, Intervener)

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) NO D2-28-70-89
SITI NORMA YAAKOB J
1 NOVEMBER 1989

Companies and Corporations — Winding up — Delay — Whether unreasonable — Locus standi of petitioner — Right of intervener to consolidate shares in respondent in manner asked for in amended petition of restructure — Central Bank of Malaysia Ordinance 1958, s 31c

Civil Procedure — Jurisdiction of court to vary own order — When court becomes functus officio

The petitioner is the registered holder of 1,000 shares in the respondent company. As a minority shareholder, he complained that the affairs of the respondent have been conducted in a manner oppressive to him and brought a winding-up petition within s 181(1)(a) of the Companies Act 1965. In December 1984, the present management took over the control of the respondent and made two allotments of shares to themselves amounting to 8,274,000 shares at a nominal value of $1 per share, thus making a hefty profit for themselves. The petitioner and the other minority shareholders were never informed nor given the chance to apply for such allotments and neither have they been paid any dividends.

On 16 January 1989, the intervener assumed control of the respondent under s 33(iii) of the Finance Companies Act 1969 so as to facilitate the capital restructuring of the respondent by reducing its paid-up capital under s 31c of the Central Bank of Malaysia Ordinance 1958. The intervener then filed Originating Petition 26-13-89 on 17 March 1989 for that very purpose, and then proceeded to apply: first, to intervene in this winding-up petition; and secondly, that the winding-up petition be stayed or heard together with the intervener's petition. On 25 March 1989, the respondent obtained an ex parte interim injunction restraining the petitioner from proceeding further with the winding-up petition. On 3 April 1989, the intervener was granted leave to intervene and an order was made that the winding-up petition and restructuring petition be heard together. On 20 June 1989, the intervener filed another motion to have that part of the intervention order obtained on 3 April 1989 varied to the extent that its restructuring petition be heard and determined notwithstanding the petitioner's unreasonable delay in getting his petition ready for hearing together with the restructuring petition.

Held, allowing the intervener's motion:

(1) Since 3 April 1989, the petitioner had not done anything to have his petition ready for adjudication together with the intervener's petition. Neither had he given any reason why he had failed to take any steps to have his petition ready for adjudication or given any indication when he would do so. Under the circumstances, his conduct had been most unreasonable and thus his petition should not stand in the way of the intervener's petition.

(2) A court becomes functus officio when it has already made a final pronouncement on the rights of the parties appearing before it. This must be distinguished from orders which are in the nature of directions as to how future proceedings on the cause of action are to be conducted which can be varied by the

same court that granted the original order. The court only becomes functus officio once the rights of the parties have been determined as the effect of such proceedings is to bring all proceedings to an end. In this case, the order that is sought to be varied is only a directional order as it lays down the future conduct as to the mode of trial of the two petitions. It is not a final order that renders the court that makes the order functus officio.

(3) The effect of reducing the respondent's capital does not affect the status of the petitioner as a registered shareholder. His name is not removed from the register and as the registered holder, he still has the locus standi to proceed with his petition.

(4) Whilst s 31c of the Central Bank of Malaysia Ordinance 1958 makes no mention of consolidation of shares or fractional shares when the capital of a company is reduced, the consolidation that is sought by the intervener is consequential upon the respondent's capital being reduced and as such, it is only one of the modes of restructuring which the intervener considers to be beneficial to the depositors.

[*Editorial Note*: The petitioner has appealed to the Supreme Court vide Civil Appeal No 01-27-89.]

Legislation referred to
Central Bank of Malaysia Ordinance 1958 s 31c

CV Das (*John Mathew* with him) for the intervener.
MS Murthi for the petitioner.

Cur Adv Vult

Siti Norma Yaakob J: The petitioner in this winding-up petition is the registered holder of 1,000 shares in the respondent company and as a minority shareholder, he complains that the affairs of the respondent have been conducted in a manner oppressive to him and he therefore brings this petition within s 181(1)(a) of the Companies Act 1965. The acts of oppression complained of by the petitioner date back to December 1984 when the present management took over the control of the respondent by the purchase of the controlling block of shares at the market value of $4.50 per share. Following this takeover, the new management made two allotments of shares to themselves amounting to 8,274,000 shares at the nominal value of $1 per share, thus making a hefty profit for themselves. The petitioner and the other minority shareholders were never informed of these allotments, nor given the chance to apply for such allotments and neither have they been paid any dividends, the inference being that all the income of the respondent had been chanelled to the management personally.

The resulting acts of oppression complained of by the petitioner are borne out by the stand taken by Bank Negara in assuming control of the business of the respondent on 16 January 1989 under s 33(iii) of the Finance Companies Act 1969, so as to facilitate the capital restructuring of the respondent by reducing its present paid-up capital of $20.274m divided into 20.274million shares of $1 each to $202,704 at $1 each under s 3lc Central Bank of Malaysia Ordinance 1958. For this very purpose, Bank Negara had filed Originating Petition No 26-13-89 on 17 March 1989, almost two months after the winding-up petition was filed on 31 January 1989.

Since the prayers sought for by Bank Negara run diametrically opposite to the winding-up petition, Bank Negara then proceeded to apply first to intervene in this winding-up petition and secondly that the winding-up petition be stayed or heard together with Bank Negara's petition and that appropriate orders be made on the two petitions.

Pending the hearing of Bank Negara's motion to intervene, the respondent had, in the mean time, on 25 March 1989, obtained an interim injunction ex parte, restraining the petitioner, his servants or agents, from proceeding further with the winding-up petition, particularly in advertising it or from holding or participating in any press conference or public forum to comment upon or discuss the petition until further order. Up to this day, the injunction still stands as the petitioner has not applied to have it set aside. After obtaining the interim injunction, the respondent had also filed a notice of motion to have the winding-up petition stayed/and or set aside and this motion was fixed for hearing on 3 April 1989 together with Bank Negara's motion for leave to intervene.

On 3 April 1989, only Bank Negara's motion was proceeded with when I granted Bank Negara the necessary leave to intervene in this winding-up petition and that the winding-up petition and the restructuring petition be heard together and appropriate orders made accordingly. The respondent's motion to have the winding-up petition set aside and/or stayed was adjourned on 3 April 1989 and to this day, the application is still pending.

On 20 June 1989, two and a half months after obtaining the order to intervene, Bank Negara filed another motion to have that part of the intervention order obtained on 3 April 1989 varied to the extent that its restructuring petition be heard and determined notwithstanding the petitioner's winding-up petition as there is unreasonable delay on the part of the petitioner to get his petition ready for hearing together with the restructuring petition.

It is not disputed that since 3 April 1989, the petitioner had not done anything to have his petition ready for adjudication together with Bank Negara's petition. As a first step, he should have applied to have the ex parte injunction obtained by the respondent against him, set aside, and he had well over two months to do just that, but he had not done anything. Neither has he given any reason why he had failed to take any steps to have his petition ready for adjudication or given any indication when he would do so. Under the circumstances, his conduct has been most unreasonable and I consider that his petition should not stand in the way of Bank Negara's petition which has been filed solely for the purpose of protecting

the interests of the 90,972 depositors, who between them had invested a total sum of $406.3m with the respondent.

Furthermore the acts of oppression complained of by the petitioner happened in 1985, but it took the petitioner another four years before he decides to file his petition to wind up the respondent by which time Bank Negara had already injected $148m into the respondent to meet the withdrawals made by the depositors of the respondent, and further delay in the hearing of its restructuring petition would defeat the very purpose of such an exercise and increase the bank's obligations to inject more capital into the respondent as withdrawals by depositors still continue to be made.

In the course of arguments the following issues were also raised:

(1) whether the court has the jurisdiction to vary its own order as the petitioner maintains that the order dated 3 April 1989 is a final order;
(2) whether the petitioner has the locus standi to proceed on his petition once the order to restructure has been ordered;
(3) whether s 31c of the Central Bank of Malaysia Ordinance 1958 confers the right to have the shares in the respondent company consolidated in the manner asked for in the amended petition to restructure.

The petitioner's objection to jurisdiction is founded on the well-settled law that once an order or judgment pronounced by a court has been drawn up and perfected, it cannot be altered or modified except as to correct errors in expressing the intention of the court (the slip rule powers) under O 20 r 11.

In this case, the slip rule does not apply as there is no slip and the petitioner maintains that the only way the order can be varied is for the Bank Negara to appeal against the order. As such, Bank Negara cannot come before the same court again as the court is already functus officio.

At this stage, it is pertinent to ask when does a court become functus officio? A court becomes functus officio when it has already made a final pronouncement on the rights of the parties appearing before it. This must however be distinguished from orders which are in the nature of directions as to how the future proceedings on the cause of action that is before the court are to be conducted. These orders, which are in the nature of directions, can be varied by the same court that granted the original order as the court is not functus officio. It only becomes functus officio once the rights of the parties have been determined as the effect of each proceedings is to bring all proceedings to an end.

In this case, the order that is sought to be varied is the second limb of the order dated 3 April 1989. That part of the order as it stands gives directions that the winding-up petition be stayed and heard together with Bank Negara's restructuring petition. In substance, it is only a directional order as it lays down the future conduct as to the mode of trial of the two petitions. The rights and obligations of the parties to the two petitions have not yet been determined by the order and to that end, it is not a final order that renders the court that makes the order functus officio. To that end, the petitioner's objection as to jurisdiction must fail as the court has the jurisdiction to entertain and, if it considers fit to do so, to dismiss or allow the motion.

The effect of reducing the respondent's capital does not effect the status of the petitioner as a registered shareholder. His name is not removed from the register and as the registered shareholder, he still has the locus standi to proceed with his petition. What would be effected by the reduction exercise is the quantity and value of the petitioner's shares as they would be reduced to 100 shares at one sen each. Thus the petitioner may still proceed with his petition even though Bank Negara may succeed in its application to restructure.

Under Bank Negara's original petition, holders of fractional shares in the respondent company would be deprived of any benefit, as such fractional shares would be cancelled. In its amended petition, what Bank Negara proposes to do is that upon the respondent's capital being reduced and on the expiry of 30 days from the date of any call being made by the respondent on its shareholders to pay on their respective shares, if no such payment is made, the shares shall be consolidated so that every 100 ordinary share shall constitute one ordinary share at $1. This nominal sum shall be credited as having been paid up and the remaining 99 shall be cancelled. However, where the consolidation results in a fraction or fractions of shares being created, each of such fraction or fractions shall be deemed to constitute one ordinary share of $1 which in turn will also be credited as being paid up.

By amending its petition, what Bank Negara in fact did is to consolidate fractional shares where no such provision was made in its original petition. What it means in practice is that under the amendment, fractional shares, such as say 5/100, would be treated as one share and credited as fully paid to the shareholder where before the amendment, no such provision was made. Thus the sense of deprivation arising from the ownership of a fractional share is taken away. To that extent, I cannot see what logical objection the petitioner can have to the effect of consolidation where fractional shares are concerned. Neither do I consider that there is any merit in the petitioner's contention that as s 31c of the Central Bank of Malaysia Ordinance 1958 makes no provision for the consolidation of shares, the court is not empowered to order so.

It is true that s 31c makes no mention of consolidation of shares or fractional shares when the capital of a company is reduced but the consolidation that is sought by Bank Negara is consequential upon the respondent's capital being reduced and as such, it is only one of the modes of restructuring which Bank Negara considers to be beneficial to the depositors. It is not introducing anything new into s 31c but is part and parcel of the machinery consequential upon a reduction of capital.

On the facts of this case, I had considered that public interest, particularly as it affects well over 90,000 depositors in the respondent company, far outweighs the interest of one single shareholder, the petitioner in this winding up petition. Bearing in mind the financial standing of the respondent company, this in itself provides a good reason that the hearing of the restructuring petition proceeded without any undue delay and on that conclusion, I had allowed Bank Negara's motion to have that part of the order dated 3 April 1989 varied so as to allow the bank's petition to be heard before the winding-up petition.

In making this order, I had also dismissed the petitioner's oral application for a stay as no special circumstances were put forward and a stay would defeat the very purpose why I had allowed the order of court dated 3 April 1989 varied.

Motion allowed.

Solicitors: *Shook Lin & Bok; Murthi & Partners.*

Reported by *Kevin Mathews*

Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd

HIGH COURT (JOHORE BAHRU) — COMPANIES WINDING UP NO 42-134 OF 1988
ABU MANSOR J
14 OCTOBER 1989

Companies and Corporations — Winding up — Whether respondent company was insolvent — Existence of supporting creditors — Whether relevant — Whether petitioner was a creditor of the respondent company — Whether the precondition that petitioner be a creditor should be first satisfied before question that company is insolvent can be considered — Companies Act 1965, ss 217, 218(a), (b) & (c)

The petitioner applied that the respondent be wound up by a petition dated 30 September 1988. The petitioner says the respondent company is indebted to the petitioner for the sum of $54,115.75 together with interest at 8% pa from 6 May 1985 to the date of realization. On 8 September 1988, the respondent company was served a copy of the statutory notice dated 6 September 1988 at the respondent's registered office. The respondent was required to pay the said sum within 21 days but no payment was received. The petitioner says that the respondent company was therefore unable to pay its debts and asked the court for the orders sought for.

The respondent company opposed the petition. On 7 December 1988, the respondent applied to strike out the petition unsucessfully because the respondent's application to have the in default judgment in the Kuala Lumpur High Court ('KL judgment') set aside had not been heard. The respondent was ordered to pursue the application in Johore Bahru only after the KL judgment had been set aside. On 23 February 1989, the KL judgment was set aside. The respondent company also had a counterclaim against the petitioner in the Kuala Lumpur suit for the sum of S$123,703.20 and it was pending in the High Court.

Held, dismissing the petition:

(1) Applying *Re Lympne Investments Ltd*,[6] when a debt was disputed on substantial ground, the petitioner was not a 'creditor' clothed with locus standi to present a petition even if the company is insolvent.

(2) The petitioner's oral application to substitute the first judgment creditor was refused because it was unjust to do so. By granting that application, the first judgment creditor would be able to short circuit the whole of the procedures incumbent on a petitioner to adhere to and comply before a winding-up order could be made and had. The procedure culminating in the ending of that corporate person must have been designed to achieve an orderly mode of winding up with sufficient checks and balances. Any short cuts would only work in injustice.

Cases referred to

1 *Teck Yow Brothers Hand-Bag Trading Co* v *Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101 (refd)
2 *National Mutual Life Association of A/Asia Ltd* v *Oasis Developments Pty Ltd & Ors* (1982) 7 ACLR 758 (refd)
3 *Mann & Anor* v *Goldstein & Anor* [1968] 2 All ER 769 (refd)
4 *Jurupakat Sdn Bhd* v *Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49 (folld)
5 *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 (distd)
6 *Re Lympne Investments Ltd* [1972] 2 All ER 385 (folld)